



In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1249

THOMAS CHESTER BORING, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

A. F. SUMMER
Attorney General

KAREN GILFOY
Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Attorneys for Respondent

Of Counsel

BILLY L. GORE
Special Assistant Attorney General

TABLE OF CONTENTS

PREFACE	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
MISSISSIPPI STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	6
ARGUMENT	6
A. The Trial Court Did Not Commit Constitutional Error in Refusing to Order Disclosure of the Identity of the Confidential Informant	6
B. The Affidavit at Bar Passes Constitutional Muster Under Aguilarian Standards	19
C. The Evidence Admitted Was Not Obtained As a Result of an Illegal and Unreasonable Search and Seizure	32
D. The Judicial Construction Given to Section 41-29-105 Suffers Not From Constitutional Infirmary	38
E. The Denial of a Continuance by the Lower State Court Did Not Violate Petitioner's Constitutional Right to Due Process of Law	43
CONCLUSION	47
CERTIFICATE	47

TABLE OF CASE AUTHORITIES

<i>Aikerson v. State</i> , 274 So.2d 124, 128 (Miss. 1973)	40
<i>Aguilar v. Texas</i> , 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)	19, 20, 21, 24, 25, 27, 28, 29, 30
<i>Barker v. State</i> , 241 So.2d 355, 357 (Miss. 1970)	22
<i>Barrett v. United States</i> , 423 U.S. 212, 46 L.Ed.2d 450, 96 S.Ct. 498 (1976)	41
<i>Boring v. State</i> , 253 So.2d 251, 255 (Miss. 1971)	30, 31
<i>Bowie v. City of Columbia</i> , 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964)	42
<i>Brinegar v. United States</i> , 388 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1948)	30
<i>Campbell v. State</i> , 278 So.2d 420, 422 (Miss. 1973)	36
<i>Chimel v. California</i> , 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)	34
<i>Cupp v. Murphy</i> , 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed. 2d 900 (1973)	34
<i>Davis v. Mississippi</i> , 394 U.S. 721, 724, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)	37
<i>Dean v. State</i> , 300 So.2d 797, 801 (Miss. 1974)	10
<i>Dunn v. State</i> , 146 So. 448 (Miss. 1933)	32
<i>Franks v. Delaware</i> , U.S., 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978)	7, 18, 31
<i>Hardy v. United States</i> , 186 U.S. 224, 46 L.Ed. 1137, 22 St.Ct. 889 (1902)	46
<i>Harris v. United States</i> , 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968)	36
<i>Henry v. Mississippi</i> , 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965)	46
<i>Howell v. State</i> , 300 So.2d 774, 775 (Miss. 1974)	36
<i>Jackson v. State</i> , 243 So.2d 396 (Miss. 1970)	45

<i>Jones v. United States</i> , 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)	19
<i>Joyce v. State</i> , 327 So.2d 255 (Miss. 1976)	7, 26
<i>Katz v. United States</i> , 389 U.S. 347, 351, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)	37
<i>Ker v. California</i> , 374 U.S. 23, 43, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963)	36
<i>King v. State</i> , 251 Miss. 161, 168 So.2d 637 (1964)	46
<i>McCormick v. State</i> , 279 So.2d 596 (Miss. 1973)	7
<i>McCray v. Illinois</i> , 386 U.S. 300, 18 L.Ed.2d 62, 87 S.Ct. 1056 (1967)	7, 16, 17
<i>McNeely v. State</i> , 277 So.2d 435 (Miss. 1973)	40
<i>Marquette Cement Mfg. Co. v. Fidelity & Deposit Co. of Maryland</i> , 173 Miss. 164, 158 So. 924 (1935)	42
<i>Matthews v. State</i> , 134 Miss. 807, 100 So. 18, 19 (1924) ..	35
<i>Meyer v. State</i> , 309 So.2d 161, 165-66 (Miss. 1975)	26, 27
<i>Morgan v. Town of Heidelberg</i> , 246 Miss. 481, 150 So.2d 512, 515 (1963)	36
<i>O'Bean v. State</i> , 184 So.2d 635 (Miss. 1966)	19
<i>Poole v. State</i> , 291 So.2d 723, 725 (Miss. 1974)	45
<i>Ratliff v. State</i> , 310 So.2d 905, 906 (Miss. 1975)	27
<i>Roviaro v. United States</i> , 353 U.S. 53, 1 L.Ed.2d 639, 77 S.Ct. 623 (1957)	7, 16
<i>Salisbury v. State</i> , 293 So.2d 434 (Miss. 1974)	33
<i>Scales v. United States</i> , 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469 (1961)	40
<i>Scott v. State</i> , 359 So.2d 1355, 1360 (1978)	44-45
<i>Sims v. State</i> , 257 So.2d 210 (Miss. 1972)	29
<i>Spinelli v. United States</i> , 393 U.S. 410, 89 S.Ct. 584, 2 L.Ed.2d 637 (1969)	19, 20, 24, 28, 30
<i>State v. Louisiana & N.R. Co.</i> , 97 Miss. 35, 53 So. 454 (1910)	42

IV

<i>Strode v. State</i> , 231 So.2d 779, 784 (Miss. 1971)	7, 20, 24
<i>United States v. Campos-Serrano</i> , 404 U.S. 293, 30 L.Ed. 2d 457, 92 S.Ct. 471 (1971)	41
<i>United States v. Cooper</i> , 421 F.Supp. 804 (W.D. Tenn. 1976)	35
<i>United States v. Moore</i> , 423 U.S. 122, 46 L.Ed.2d 333, 96 S.Ct. 335 (1975)	41
<i>United States v. Thomas</i> , 489 F.2d 664 (5th Cir. 1974) ..	18
<i>United States v. Toombs</i> , 497 F.2d 88, 93 (5th Cir. 1974)	13
<i>United States v. Ventresca</i> , 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)	25, 27, 29
<i>Winters v. New York</i> , 333 U.S. 507, 514, 92 L.Ed. 840, 68 S.Ct. 665 (1948)	38
<i>Wolf v. State</i> , 260 So.2d 425, 428 (Miss. 1972)	26
<i>Young v. State</i> , 245 So.2d 26 (Miss. 1971)	7

STATUTES CITED

28 U.S.C. §1257(3)	2
Act of March 25, 1974, ch. 415, §1(q)(r)(s)(z) [1974] <i>Gen. Laws Miss.</i> 489	3
§41-29-105, <i>Miss. Code</i> 1972 Ann. (Supp. 1978)	3, 38, 39, 43
§97-11-37, <i>Miss. Code</i> 1972 Ann. (1973)	33
§99-15-29, <i>Miss. Code</i> 1972 Ann. (1973)	46

OTHER AUTHORITIES

House Bill No. 1238	3, 39
---------------------------	-------

In the Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1249

THOMAS CHESTER BORING, JR.,
 Petitioner,

vs.

STATE OF MISSISSIPPI,
 Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

I. PREFACE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered on December 20, 1978, affirming his conviction for the manufacture (by growing) of marijuana. Petitioner, on a former day, had received a trial by jury in the Circuit Court of Leflore County, Mississippi.

The indictment, omitting the formal portions thereof, reads as follows:

"That THOMAS C. BORING, JR. . . . on the 17th day of June 1977 . . . did unlawfully, wilfully and feloni-

ously manufacture a controlled substance by propagating or growing 23 plants of cannabis, commonly called marijuana. . ."

Petitioner was sentenced to serve a term of five (5) years with the Mississippi Department of Corrections (with two [2] years suspended) and ordered to pay a fine in the sum of \$1000.00. SEE: Petitioner's Appendix A.

II. OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported below as Thomas C. BORING, JR. v. STATE of Mississippi, 365 So.2d 960 (Miss. Dec. 20, 1978). A copy of that opinion is appended to petitioner's pleading as Appendix B.

Rehearing was denied by that Court on January 10, 1979. A copy of the official report of the action of the Supreme Court of Mississippi in denying rehearing is appended to petitioner's pleading and marked Appendix C.

III. JURISDICTION

Petitioner seeks to invoke the appellate jurisdiction of this Court by way of a Petition for Writ of Certiorari drawn and presented under the authority granted in 28 U.S.C. §1257(3). Respondent takes no issue with petitioner's jurisdictional statement.

IV. QUESTIONS PRESENTED

Respondent directs no challenge to the five (5) questions posed by petitioner. We elect here to respond to the merits of each one of them.

V. CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has sufficiently identified and set forth the constitutional provisions involved in this cause.

VI. MISSISSIPPI STATUTES INVOLVED

Petitioner has correctly recited the applicable portions of the statutory provisions as codified. It is necessary, however, for a fair and complete resolution of the question posed in section IV at p. 15 of his petition that respondent supplement §41-29-105 with a copy of the applicable portions of House Bill No. 1238, a piece of legislation enacted on March 25, 1974, for the purpose of amending, *inter alia*, §41-29-105. SEE: Act of March 25, 1974, ch. 415, §1(q) (r) (s) (z) [1974] Gen. Laws Miss. 489.

While this legislation, in its codified form, contains a comma after the word "indirectly", House Bill No. 1238 does not.

Chapter 415

House Bill No. 1238.

AN ACT TO AMEND SECTIONS 41-29-105 AND 41-29-113, MISSISSIPPI CODE OF 1972, TO DEFINE THE TERM "HASHISH" AND TO REDEFINE THE TERM "MARIHUANA"; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 41-29-105, Mississippi Code of 1972, is amended as follows:

41-29-105. The following words and phrases, as used in this article, shall have the following meanings, unless the context otherwise requires:

* * *

H. B. No. 1238

Page 2

* * *

(q) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term "manufacture" does not include the preparation or compounding of a controlled

H. B. No. 1238

Page 3

substance by an individual for his own use or the preparation, compounding, packaging or labeling of a controlled substance:

(1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

(2) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale.

(r) "Marihuana" means all parts of the plants of the genus Cannabis and all species thereof, whether growing or not, the seeds thereof, and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seeds, excluding hashish.

(s) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means

of chemical synthesis, or by a combination of extraction and chemical synthesis:

* * *

H. B. No. 1238

Page 4

* * *

(z) "Production" includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance.

VII. STATEMENT OF THE CASE

Petitioner has fairly and accurately summarized the basic facts of the case, and we elect not to plow that ground again here. Respondent at the present time has the two volume trial record before him and where applicable will refer to it by page number in the arguments advanced below.

VIII. REASONS FOR DENYING THE WRIT

ARGUMENT

A.

The Trial Court Did Not Commit Constitutional Error in Refusing to Order Disclosure of the Identity of the Confidential Informant.

Petitioner claims that the testimony of record reflects a bona fide factual dispute with regard to the question of whether or not the confidential informant acted as an agent for the police when, and if, he obtained evidence against Dr. Boring by virtue of trespass and breaking and entering. In this posture, he argues, the search warrant was based upon "half-truths and misrepresentations and disguised the illegal activities of one acting for the authorities." [Petitioner's pleading at p. 10] Moreover, petitioner submits that if such a trespass and breaking and entering was perpetrated by the informant at the direction of the officer(s), the search warrant was *ipso facto* of no legal force.

The primary thrust, therefore, of his present contention is that the testimony of the confidential informant "... would have been not only relevant and helpful, but absolutely necessary to reach the truth [of these matters] and to establish probable cause for the issuance of the search warrant and the legality of the subsequent search." [Petitioner's pleading at p. 11]

Respondent contends, on the other hand, that while the testimony lends credence to the theory that the informant trespassed upon the petitioner's premises at a time when the house was vacant and took therefrom two growing marijuana plants, there is not one whit of proof, apart from wild and unbridled inferences and innuendos,

that he was acting in any capacity other than that of a private and interested citizen rather than an agent or servant of the police at their direction.

Moreover, petitioner at no time subsequent to the *ex parte* issuance of the search warrant, made a "substantial preliminary showing" that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by any one of the three affiants in their affidavit for the warrant. *Franks v. Delaware*, U.S., 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978).

In this case the informant provided firsthand information which formed the basis for probable cause to search petitioner's premises. Whether the so-called informant's privilege is absolute in an evidentiary environment where the issue is not guilt or innocence or whether, *a la Roviario*,¹ disclosure depends on the particular circumstances of each case, nondisclosure here was not unconstitutionally erroneous. It is clear that the trial judge, during the suppression hearing, was satisfied that the affiants spoke truthfully and that they had relied in good faith upon credible information supplied by a reliable informer, and for this reason he exercised the discretion conferred upon him by the law of Mississippi to respect the informant's privilege.²

1. *Roviario v. United States*, 353 U.S. 53, 1 L.Ed.2d 639, 77 S.Ct. 623 (1957).

2. The Mississippi Supreme Court is one of several state appellate courts adhering to the evidentiary rule discussed in *McCray v. Illinois*, 386 U.S. 300, 18 L.Ed.2d 62, 87 S.Ct. 1056 (1967), that where the issue is a preliminary one of probable cause for arrest or search, rather than guilt or innocence, police officers are not invariably required to disclose an informer's identity, if the trial judge is convinced by evidence submitted in open court and subject to cross-examination that the officers relied in good faith upon credible information supplied by a reliable informer. *Strode v. State*, 231 So.2d 779, 784 (Miss. 1971).

SEE ALSO: *Joyce v. State*, 327 So.2d 255 (Miss. 1976); *McCormick v. State*, 279 So.2d 596 (Miss. 1973); *Young v. State*, 245 So.2d 26 (Miss. 1971).

A brief synopsis of the factual environment at bar is necessary, we think, at this point. The meeting between Leflore County Deputy Sheriff John Wayne Fondren and the confidential informant occurred at approximately 11:00 p.m. on the night of June 16, 1977. The subsequent search of petitioner's premises took place at 3:00 a.m., the morning of June 17, 1977. Petitioner was indicted on November 10, 1977, arraigned on November 15th, afforded a Fourth Amendment "probable cause" hearing on November 15th, and tried on November 28 and 29, 1977. Petitioner neither testified at trial on the merits of the case nor at any preliminary proceeding.

Petitioner's pretrial request for disclosure of the informant's identity was embodied in a general request for discovery filed November 21, 1977, and styled "Motion To Reveal Information." (R. 10) The applicable part thereof reads as follows:

The defendant moves this Court for an order disclosing the names and addresses of any informers for the State of Mississippi in this cause, whether paid or unpaid, and for an order revealing the information requested in paragraphs A through G of this motion, and in support thereof would show:

1. In order for the defendant to properly defend himself on the charge against him, it is necessary for the State of Mississippi to disclose the names and addresses of any persons who may have been witnesses to the transaction with which defendant is charged or any persons who may have aided, abetted or in any way facilitated the crime or who may have provided any information regarding the crime, as well as the following information regarding said persons:

A. * * * (R. 10)

At the conclusion of a suppression hearing conducted on November 21, 1977, the trial judge ruled as follows:

THE COURT: Counsel, the Court is of the opinion that insofar as this record has revealed, it is not incumbent upon the State to disclose this informant's name. Now the Court will, if counsel wishes, be glad to hear argument on authorities at a later time, if it's not possible to do so now, but I don't think counsel has made a case of the exception, as offered in your motion here. (R. 89-90)

Prior to jury selection and trial on November 28, 1977, defendant renewed, in written form, his motion to require disclosure. He alleged therein for the first time that: [1] Deputy Fondren sent the informant who trespassed on Dr. Boring's property and that the informant placed all of the marijuana plants at this location; [2] the testimony of the informant would establish that the search was unreasonable and that the evidence was planted by the state; [3] the informant was a participant as well as a witness to the offense and his testimony is relevant and necessary to the defense of the accused. (R. 94)

The court below thereafter heard testimony on the defendant's motion for a continuance as well as the issue dealing *de novo* with disclosure of the informant's identity. (R. 106-123) At the conclusion of this hearing, the trial judge ruled "... that the defense has not shown sufficient grounds for granting either of these requests. . .". (R. 123) The cause then came on for trial.

Respondent backtracks briefly at this point in order to assess the testimony presented at both pretrial suppression hearings as well as that adduced during trial on the merits. At the initial suppression hearing conducted pursuant to petitioner's pretrial motion to suppress, each of the three

affiants (Deputy Fondren, Deputy Banks, and Sheriff Freeman) testified in detail as to matters dealing with the information supplied by the informant, the swearing out of the affidavit, the issuance of the search warrant, the service of the fiat and the subsequent search. (R. 28-89) Each of the three affiants, we note, was subjected to rigorous cross-examination.

There is not one iota of proof, nor is it even mildly suggested at this point in the proceedings, that the informant was acting as an emissary for the state when, and if, he trespassed upon petitioner's property and obtained the marijuana plants. Nor was an assault upon the integrity of the affidavit made at this time. The trial judge correctly overruled petitioner's request for disclosure under Mississippi's procedural rule that:

[A] motion is at issue without further pleading and that *the allegations thereof do not amount to any proof of the facts stated therein. It is the duty of the movant to support his motion by proof and in the absence of proof in support of the motion, the presumption in favor of the correctness of the action of the trial court will prevail.* (Brown v. State, 252 So.2d 885, 887 (Miss. 1971).

Dean v. State, 300 So.2d 797, 801 (Miss. 1974). [emphasis supplied]

As indicated at an earlier point in our response, petitioner, prior to trial on the day thereof (November 28, 1977), filed a sworn renewal of his motion to require the State of Mississippi to divulge the identity of the informant. In that motion he alleged for the first time that Deputy Fondren sent³ the confidential informant to Dr.

3. This word is used repeatedly throughout petitioner's pleading. It does not appear in this context anywhere in the testimony recorded during the proceedings conducted below.

Boring's Greenwood residence and that the informant physically "... placed there all of the plants later found at the residence and placed there the two plants which he gave to Deputy Fondren." (R. 94)

Attached to this motion is a transcription of a colloquy that purportedly took place between Deputy Banks and defense attorney, Debbie Selph, during petitioner's Fourth Amendment probable cause hearing conducted in justice court. This transcription was not the work product of a court reporter but was prepared by defense counsel's secretary from a tape recording made by Ms Selph during the justice court proceedings.

Ms Selph testified pursuant to this renewed motion that she did indeed cross-examine Deputy Banks at the pretrial hearing on the Motion to Suppress Evidence, but at that time she did not suspect that Deputy Fondren, or any of the other officers, would withhold that information from the Court.

Deputy Bank's hearsay testimony is a matter of record in the form and format alluded to, and we feel compelled to recite that colloquy here:

TESTIMONY OF CHIEF DEPUTY RICKY BANKS

SELPH: O.K. Can you tell me what exactly was related to the [issuing] judge?

BANKS: Deputy Fondren told him what . . . he swore us in before we signed the affidavit on the search warrant and he more or less let him read what the Underlying Circumstances we had typed up and whatever it said that's what Deputy Fondren said. I know he told him that he had an informer to go to Dr. Boring's house and the informer brought two marijuana plants back to him. I believe it was on Park Avenue.

SELPH: So was the informant more or less sent by the Sheriff's office to Dr. Boring's house? He didn't just discover this on his own and then report it to you?

BANKS: No, Deputy Fondren, I believe he told me that the informant told him that they had some plants over there and he . . . the Deputy in turn told him that they had to have some proof that the plants were there. (R. 96; emphasis supplied)

It is interesting to note that during this second pretrial hearing conducted the day of trial but prior thereto, no effort was made by the defense to recall any of the three affiants for further testimony on the issue presented.

Petitioner's entire claim on the disclosure issue is predicated tenuously on the hearsay testimony delineated above. It is clear that counsel sought to use the transcription as substantive evidence of the informant's participation in this caper at the request and direction of the Leflore County authorities. This will simply not wash. While appellant's motion was sworn, its allegations amounted to nothing more than the proverbial conjecture, speculation, and surmise.

Assuming that the twice-compounded hearsay testimony transcribed by defense counsel's legal secretary is accurate, as well as true, Bank's statement does little more than mildly intimate that the informant acted at Fondren's direction. The fact that Deputy Fondren may have said at some point to Deputy Banks that he [Fondren] ". . . had an informer to go to Dr. Boring's house. . ." is patently susceptible to the interpretation that Fondren's informant simply, of his own free will and volition, went to Dr. Boring's Greenwood residence. The subsequent colloquy on this point is, likewise, equivocal.

Much more than mere speculation is required before disclosure is constitutionally required. In *United States v. Toombs*, 497 F.2d 88, 93 (5th Cir. 1974), we find in footnote 5 this language:

Much more than speculation is required. There must be a compelling reason for the disclosure. "If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more." *Miller v. United States*, 5 Cir., 1959, 273 F.2d 279, 281. See also *Bruner v. United States*, 5 Cir., 1961, 293 F.2d 621; *Lira-Ortega v. United States*, 5 Cir., 1968, 401 F.2d 506; *United States v. Ruacho-Acuna*, 5 Cir., 1971, 440 F.2d 1199.

497 F.2d at p. 93.

Appellant's contention that the identity of the informant should have been disclosed because he was a participant acting as an agent of the Leflore County Sheriff's Department is simply not supported by the proof shown at either hearing conducted prior to trial, and nondisclosure at this point was certainly not erroneous. The transcribed colloquy, we submit, is indicative of a lack of due diligence during defense counsel's cross-examination of the affiants at the first suppression hearing conducted November 21, 1977.

The trial record indicates that the transcription of counsel's tape recording made during the justice court proceedings had not been completed at the time of the full-

blown suppression hearing conducted a week prior to trial. Consequently, according to counsel, neither Banks nor Fondren were confronted at this time with the question of whether or not the informant was motivated by good citizenship or the prospect of pecuniary reward, and whether he performed his clandestine mission acting as an agent or servant of the police at their direction. If petitioner was injured by his inability to develop the ambiguous testimony purportedly existing, surely the wound was self-inflicted.

Regrettably, insofar as the length of our response is concerned, the inquiry does not end here. During trial on the merits both affiants Banks and Fondren, during cross examination, were at last confronted with the magic question: "Who, if anybody, sent the informant to petitioner's home?" Their responses to the numerous inquiries focusing on this issue is too lengthy to reproduce here. Fondren's testimony, however, is paraphrased as follows:

CROSS EXAMINATION AT TRIAL OF AFFIANT/DEPUTY FONDREN

I did not tell the confidential informant to go over to Dr. Boring's house. I did not tell him to cut the screen, put the tray of plants inside Dr. Boring's porch, and bring them back to me. I did not tell him anything in this regard. I didn't send the informant over there to get the plants. I don't know that anybody sent him. I sure know that I didn't. After the informant brought me the plants I took them to Sheriff Freeman. I never told Deputy Banks that I sent the confidential informant to Dr. Boring's house to get some plants. If Banks testified to this effect during the justice court proceedings, he was mistaken. I did not tell Banks at any time that I had an informant to go to Dr. Boring's house and that the informant

brought two marijuana plants back to me. I did not tell Banks that the informant told me there were some plants over there and that I, in turn, told the informant we had to have some proof the plants were there. If Banks said otherwise, he was mistaken. (R. 134-38)

During defense counsel's cross examination of Deputy Banks, the transcribed colloquy containing Banks' purported statements made during the probable cause hearing in justice court was used by the defense as an impeachment tool. Banks was confronted with the transcript and acknowledged that he must have testified at that time that Fondren told him "that he had an informant to go to Dr. Boring's house, and the informer brought two marijuana plants back to him." (R. 166) When asked at trial if Fondren told him [Banks] that Fondren told the informant they had to have some proof that the plants were there, Banks replied, "Yes, sir, I guess so." (R. 167)

Asked if he testified to the truth on that former occasion, Banks replied that, "I don't know whether I did or not. I don't know whether I got it from Deputy Fondren or [county attorney] Charlie Swayze." (R. 167)

Relevant colloquy on the issue ended as follows:

Q. And so you now testify that you could be mistaken about Deputy Fondren telling you that he sent the person over there to get the plants?

A. I think I was mistaken, yes, sir.

Q. So you withdraw that testimony that you gave at the preliminary hearing, on grounds that you were mistaken?

A. I don't withdraw it, no, sir. (R. 168)

These are the salient facts upon which petitioner's present complaint is predicated. Certainly it was not shown at the proper time (prior to trial) by competent evidence that the officers sent the informant to Dr. Boring's house. Moreover, during the trial Deputy Fondren succinctly denied that he had sent the informant and he further denied that he had told Deputy Banks he had done so. County Attorney Swayze was never called as a witness by either party.

Banks, at trial, declined to withdraw his testimony given at the justice court hearing. As we have pointed out previously, however, that testimony is patently susceptible to a more reasonable construction than the one relied upon by petitioner. Even so, it was too late at this point under Mississippi law to revitalize the disclosure issue when petitioner had an opportunity to extensively question both Banks and Fondren with regard to this matter at both pretrial hearings but failed to do so.

We are confronted here with a set of evidentiary circumstances involving an informant who provided information which, together with independent police investigation [a field test conducted on the substance in question], furnished probable cause for the issuance of a search warrant by a neutral and independent judicial magistrate.

McCray v. Illinois, *supra*, dealt with a similar situation involving disclosure in a nonwarrant environment. This Court, distinguishing *Roviaro*, said:

What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity even in formulating evidentiary rules for federal criminal trials. *Much less has the Court ever approached the formulation of a federal evidentiary rule of compulsory disclosure*

where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake. Indeed, we have repeatedly made clear that federal officers need not disclose an informer's identity in applying for an arrest or search warrant. As was said in United States v. Ventresca, 380 US 102, 108, 13 L ed 2d 684, 688, 85 S Ct 741, we have "recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved 'whose identity need not be disclosed. . . was "credible" or his information "reliable." ' *Aguilar v. Texas*, *supra*, [378 US] at 114, [12 L ed 2d at 729.]" (Emphasis added.) See also *Jones v. United States*, 362 US 257, 271-272, 4 L ed 2d 697, 708, 709, 80 S Ct 725, 78 ALR2d 233; *Rugendorf v. United States*, 376 US 528, 533, 11 L ed 2d 887, 891, 892, 84 S Ct 825.¹¹

McCray v. Illinois, 386 U.S. at pp. 311-12. (Emphasis supplied; footnote 11 omitted)

Here, as in *McCray*, the affiants testified, in open court, fully and in detail as to what the informant said. Each officer was under oath, and each was subjected to searching cross-examination. The trial judge obviously did not doubt their credibility and did not require disclosure of the informant's identity or his production.

The question of disclosure should rest entirely with the judge who hears the motion to suppress and observes the conduct and demeanor of the witnesses. Disclosure is the exception and not the rule. The burden is on

the defendant to show why it is necessary. That burden was not successfully met in the case *sub judice*.

It is suggested that the allegations contained in the affidavit were not supported by the proof but were, in fact, clearly contradicted and based on half-truths and misrepresentations. We find no misrepresentations in the affidavit at bar, intentional or otherwise. Certainly there is no proof that any of the three affiants attempted to deliberately deceive the justice court judge. Assuming for the sake of argument that the record suggests unintentional misrepresentation [it does not], the affidavit is not subject to invalidation unless the erroneous statement is material to establish probable cause. *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1974).

Each person signing the affidavit must, of course, appear before the issuing magistrate. In this case each did. Each affiant must indicate which of the described observations he made. In the case *sub judice* it is clear from the affidavit, the warrant itself, and the testimony adduced at the suppression hearing that each did. (R. 2-67) In short there is no proof of an intentional misstatement by an affiant or of a negligent or unreasonable assertion made to the issuing justice court judge.

Franks v. Delaware, *supra*, is not applicable to this case because there was no substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit by the affiants. In this posture revelation of the informant's identity was neither essential to reach the truth nor to establish probable cause for the issuance of the warrant. Petitioner's Due Process and Sixth Amendment claims are devoid of merit.

B.

The Affidavit at Bar Passes Constitutional Muster Under Aguilarian Standards.

This contention brings into focus the questions of whether or not the Leflore County authorities had probable cause sufficient to support the application for the search warrant as required and defined by the judicial decisions of the United States Supreme Court and whether or not the affidavit itself passes constitutional muster. They did, and it does. The affidavit for the warrant, together with a statement of underlying facts and circumstances, is attached to petitioner's pleading as appendix D at p. A-8.

It is axiomatic, of course, that probable cause may be based upon the direct observation of the affiant himself. It is equally well-established that probable cause may be based upon hearsay information alone and need not reflect the direct personal observation of the affiant. *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *O'Bean v. State*, 184 So.2d 635 (Miss. 1966). It follows that probable cause may also be based upon a combination of direct observation and hearsay information. *Aguilar*, *supra*; *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 2 L.Ed.2d 637 (1969).

The question posed at bar requires, *inter alia*, an evaluation of the arguably important hearsay information furnished to the affiant(s) by a source referred to guardedly as a "confidential informer." As far as may be deduced from the four corners of the application, he (or she) is presumptively a typical police informant from the so-called "criminal milieu" and, therefore, needs to be subjected to a cautious and skeptical scrutiny under the rigorous standards of *Aguilar* and *Spinelli*, *supra*.

Applicable here is the oft-cited language appearing in *Strode v. State*, 231 So.2d 779, 783 (Miss. 1970), neatly summarizing the dual analysis of probable cause required by *Aguilar* as well as the distinct therapeutic devices of *Spinelli*.

"The two-part test of *Aguilar* requires a magistrate to be informed of (1) some of the underlying circumstances from which the informer concluded that the defendant was the one guilty of the offense, and (2) some of the underlying circumstances from which the officer concluded that the informer was credible or his information reliable. In short, under the basis-of-knowledge test, the informer must have obtained his knowledge by personal observation or in some other dependable manner rather than through casual rumor. The second reliability test is an attempt to guard against tips provided by untruthful or unreliable informers, and suggests that an informer is credible if he has provided truthful tips in the past. Moreover, the information may be deemed reliable if corroborated by independent investigation. Both tests require only that some of the underlying circumstances be sworn to. Furthermore, in *Spinelli*, the Court indicated that the basis-of-knowledge test could be fulfilled without a statement of the circumstances from which the informer derived his information; i.e., if a tip is sufficiently detailed, it may be self-verifying, and one may conclude that the informer was not relying on mere rumor."

231 So.2d at p. 783.

In undertaking the evaluation of the hearsay information furnished to one of the affiants (*Fondren*) by the informant at bar, we follow the procedure set out in *Spinelli, supra*.

"The informer's report must first be measured against *Aguilar*'s standards so that its probative value can be assessed."

393 U.S. at p. 415.

The two-pronged test of *Aguilar* established constitutional guidelines for measuring hearsay information in a probable cause setting, either as a predicate for a warrant or for acting, under appropriate circumstances, without a warrant. *Aguilar* was concerned with the trustworthiness of hearsay. The bipartite test articulated therein includes: [1] A "Basis of Knowledge" Prong and [2] a "Veracity" Prong. The latter may be neatly bisected into: [a] A "Credibility" Spur and [b] a "Reliability" Spur. *Aguilar* requires that both the "basis of knowledge" prong and the "veracity" prong be satisfied.

The "basis of knowledge" prong requires of him who would act upon hearsay, a knowledge of some of the underlying circumstances upon which the informant based his conclusion. The "veracity" prong, on the other hand, appears in the alternative and requires of him who would act upon the hearsay, a knowledge of some of the underlying circumstances which leads to the conclusion that the informant is (1) "credible or (2) his information reliable." This essentially simple outline can be an instrument of precise analysis, and we elect to employ it in our evaluation of the hearsay information presented in the case at bar.

[1] THE "BASIS OF KNOWLEDGE" PRONG

Respondent will look first to the "basis of knowledge" prong of *Aguilar*'s "two-pronged" test in order to assess the existence of underlying circumstances from which the informant concluded that growing marijuana plants were where he claimed they were. This test is not concerned one whit with an informant's honesty or "veracity." It

is concerned rather, with conclusionary validity, i.e., "How valid is the informant's conclusion?"

The "basis of knowledge" prong assumes an informant's "veracity", and then proceeds to extensively probe and test his conclusion. What are the raw facts upon which the informant based *his* conclusion? How did he obtain those facts? Did the informant tell to the affiant that which he saw with his own eyes; that which he heard with his own ears; that which he touched firsthand with his own fingers; that which he smelled with his own nose? In other words, in determining probable cause the magistrate's first question to the officers should be, "How do you, or your informer, know that there is marijuana on these premises?" *Barker v. State*, 241 So.2d 355, 357 (Miss. 1970).

An informant who does not speak from personal knowledge may well be passing on an amalgam of casual underworld rumor and unreliable barroom gossip. He may leap to an erroneous conclusion on the basis of innocent or ambiguous observations. Even a "credible" informant may engage in erratic and bizarre flights of mental logic.

This is precisely why the magistrate must know exactly what the informant saw and heard and must not accept an informant's bare conclusion. The magistrate must ascertain the source of the raw data - the product of someone's senses - and then weigh that data for himself. Under the "basis of knowledge" test, he is not concerned one iota with that portion of the affidavit or sworn testimony which provides information about the informant but rather with the recitation of the story emanating from the lips of the informant.

The affidavit at bar, we respectfully submit, satisfies the "basis of knowledge" test with flying colors. The

informant had first-hand information concerning the following:

- [1] Identity of Suspect: Dr. T.C. Boring
- [2] Suspect's Address: 103 Virginia Street, Greenwood, Leflore County, Mississippi
- [3] Identity of Contraband: Growing marijuana plants
- [4] Quantity of Contraband: 30 to 50 plants
- [5] Location of Contraband: Back porch of suspect's residence
- [6] Posture of Contraband: Present and growing
- [7] Basis for Conclusion: Personal Observation

The affidavit was presented to the magistrate during the early morning hours of June 17, 1977. Several hours earlier on the evening of June 16, 1977, the informer had been present at Dr. Boring's residence and had seen the marijuana plants. Not only did he visually perceive the contraband, he touched it with his own fingers when he physically seized two of the growing plants and relinquished them with haste to the control of affiant, Fondren. The informant believed the plants to be marijuana because he had personally seen marijuana in the past.

Certainly a neutral and detached magistrate would reasonably and justifiably conclude that marijuana plants were where the informant claimed they were at the time the application for the search warrant was presented to him. The informant's conclusion that contraband was on the premises was based upon personal observation and firsthand knowledge, not idle rumor. In this posture the "basis of knowledge" test has been fully satisfied, and it is not necessary to discuss, in the alternative, the cure

for a defective "basis of knowledge", i.e., the "self-verifying detail" technique described in *Spinelli, supra*.

[2] THE "VERACITY" PRONG

Respondent now turns to the so-called "veracity" prong of *Aguilar's* two-pronged test in order to assess whether there was furnished sufficient underlying circumstances from which the affiant(s) concluded that the informant was "credible OR his information reliable." Once having located the original source - the person who saw, heard, touched, or smelled something firsthand - then and only then did *Aguilar* look to the "veracity" of that source. As a substitute for the classic trustworthiness device of the oath, it sought some alternative guarantee that the declarant spoke truthfully.

The "veracity" prong in precise terms has two disjunctive spurs, seeking either [a] the inherent "credibility" of the source himself or [b] some other circumstances reasonably assuring the "reliability" of the information on the particular occasion of its being furnished.

[a] "CREDIBILITY" SPUR

The affidavit at bar is not, we candidly admit, overly inclusive with regard to the informant's past propensity for truthfulness. Reference is repeatedly made, however, to the informant's previous history of reliability.

Arguably, supporting facts which show that an informant's information is "reliable" thereby show also that the informant is, on that occasion at least, "credible." The recitation that the informant at bar had provided information in the past to the Leflore County Sheriff's Office that proved to be "accurate and correct" indicates that he was certainly truthful on the prior occasions. As the Mississippi Supreme Court recognized in *Strode, supra*,

the second *Aguilarian* test "... is an attempt to guard against tips provided by untruthful or unreliable informers, and suggests that an informer is credible if he has provided truthful tips in the past." 231 So.2d at p. 783. (emphasis supplied)

Moreover, this Court in *Aguilar* voiced its preference for warrants. That preference is so marked that less persuasive evidence will justify the issuance of a warrant than would justify a warrantless search (or a warrantless arrest). As the Court there said:

"Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' *ibid.*, and will sustain the judicial determination so long as 'there was substantial basis for [the magistrate] to conclude that narcotics were probably present. * * *'."

378 U.S. at p. 111.

[A "substantial basis" does not appear to mean anything different from or less than the two-pronged test of *Aguilar*.]

This preference for warrants was rearticulated in *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), where the Supreme Court stated that "... affidavits for search warrants ... must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." 380 U.S. at p. 108.

In *Ventresca* we find the following:

"However, where these [underlying] circumstances are detailed, where reason for crediting the source

of the information is given, and when a magistrate has found probable cause, the courts should not *invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner*. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, *the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants*. Jones v. United States, supra, 362 U.S. [257], at 270, 80 S.Ct. [725], at 735, [4 L.Ed.2d 697 at 707, 78 A.L.R.2d 233]."

380 U.S. at p. 109. (emphasis supplied)

The Mississippi Supreme Court in *Meyer v. State*, 309 So.2d 161, 165-66 (Miss. 1975), said:

We follow the rule that provisions for search and seizures are strictly construed against the state. *However, when the circumstances are detailed, the reason for crediting the source of information is given, and the judicial officer has found probable cause, we will interpret the affidavit in a common sense manner. Where the question is close as to probable cause, we will give preference to the warrant.* * * *

309 So.2d at pp. 165-66. (emphasis supplied)

SEE ALSO: *Joyce v. State*, 327 So.2d 255, 258 (Miss. 1976); *Wolf v. State*, 260 So.2d 425, 428 (Miss. 1972).

We respectfully invite this Court to approach the affidavit at bar in this spirit. It would appear that the Constitution commands that reviewing courts eschew "a grudging or negative attitude" toward warrants lest they "... discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S. at p. 108.

The *Ventresca* mandate, we think, invites reviewing courts to read possibly ambiguous language with an eye toward upholding a warrant's validity rather than striking it down. When the affidavit at bar is construed in this manner, one must conclude that the "credibility" spur of *Aguilar's* "veracity" prong has been satisfied, although barely.

Furthermore, the warrant itself recites that the judicial officer not only considered the facts and circumstances set out in the affidavit but also "... heard and considered evidence in support thereof from the affiants. ...". We invoke the presumption under Mississippi law that the judge satisfied himself that the information given by the affiant was credible. *Meyer v. State*, 309 So.2d 161, 165 (Miss. 1975).

[b] "RELIABILITY" SPUR

The "veracity" prong of *Aguilar* is significantly phrased in the disjunctive. Assuming that the magistrate's knowledge of the informant's credibility is "zero", he may alternatively ask, "Was the information furnished under circumstances giving reasonable assurances of trustworthiness?" If so, the information is "reliable," notwithstanding the ignorance as to its source's credibility.

Obviously there is some distinction between an informant's "credibility" and the "reliability" of his information. Informational "reliability", as something separate from its source's credibility, would seem to involve some circumstances assuring trustworthiness on the particular occasion of its being furnished. SEE: *Ratliff v. State*, 310 So.2d 905, 906 (Miss. 1975).

In the case at bar the informant not only told affiant Fondren that he personally observed 30 to 50 growing marijuana plants at Dr. Boring's residence, he actually furnished Fondren with two of the small leafy plants.

A more reasonable assurance of trustworthiness can hardly be contemplated. Assuming then that there are insufficient circumstances articulated in the affidavit for a judicial assessment of the informant's credibility - while thin, indeed, the affidavit is not completely devoid - the "reliability" spur is more than satisfied, and the dual test of *Aguilar* has consequently been met.

But we need not stop here. Respondent has yet another alternative arrow (or two) in its constitutional quiver. *Spinelli* devised, or at least enunciated, substitute means for satisfying *Aguilar*'s demands on the issue of veracity. This therapeutic device was identified in *Strode v. State*, as follows: "... the information may be deemed reliable if corroborated by independent investigation." 231 So.2d at p. 783.

When the internal recitation of some of the underlying circumstances which led the officer to conclude that his informant was "credible" or his information "reliable" has not been sufficient to satisfy *Aguilar*'s "veracity" prong directly, this buttressing technique - independent investigation - comes into play to determine whether it can "fairly be said that the [informant's] tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration." *Spinelli*, 393 U.S. at p. 415.

The relevance of this particular medication to this particular malady is clear. When independent police observations have verified part of the story by the informant, that corroboration lends credence to the remaining unverified portion of the story by demonstrating that the informant has, to the extent tested, spoken truthfully. The verification helps to demonstrate his "credibility" as well as to intensify the reliability or trustworthiness of his information.

Chief Deputy Ricky Banks, one of three affiants, personally observed the two marijuana plants delivered by the informant to affiant Fondren. Banks, as did the informant, identified the specimens as marijuana plants because he also had seen marijuana in the past. But Deputy Banks did not rely solely on his own visual acuity or the ocular perception of Fondren's informant. He indicated during the motion to suppress that he conducted a preliminary field test on the substance and that this test was positive for marijuana. (R. 57) While a field test is not conclusive on the question of identification, it is sufficient for the purpose of probable cause. Consequently, a relevant aspect of the informant's conclusions was independently verified by the Leflore County Sheriff's Department. SEE: *Sims v. State*, 257 So.2d 210 (Miss. 1972).

Admittedly, the underlying facts and circumstances sheet attached to the affidavit makes no reference, per se, to a field identification test. While this is indeed distressing, it is not fatal. A portion of the affidavit does contain the phrase, "These plants were identified as marijuana by the undersigned Chief Deputy Ricky Banks. . .".

It would have been preferable, of course, to have made explicit what was here left as implicit. Still, a reasonable interpretation, under *Ventresca* guidelines, of the language within the four corners of the affidavit and the attached recitation of underlying facts and circumstances, lends credence to the theory that the justice court judge was informed by Banks that he had identified, preliminarily, the contraband via a field identification test.

The assertions made about the informant's credibility and his informational reliability, buttressed by the corroboration of part of the informant's story by independent police observation and investigation, is as trustworthy as an assertion which would pass *Aguilar*'s test without indepen-

dent corroboration. If we conclude that Aguilar's "veracity" test has not been passed outright, clearly Spinelli's buttressing technique shores up the defect, if any.

This verification of so much of the informant's story clearly lends credence to the few remaining unverified portions of it and directly establishes "credibility" under Spinelli. Once "credibility" has been established, the informant's story becomes little more than surplusage. If the informant at bar had been nothing more than a "Star Wars" robot or a trained ape, the identification of the contraband by way of a police administered chemical field identification test - with the informant as a mere mechanical agent - would have been sufficient to establish probable cause.

Probable cause is a practical, non-technical concept, based upon the conventional considerations of everyday life on which reasonable and prudent men, not legal technicians act. *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1948).

Affiants at bar had both personal knowledge and reasonably trustworthy information that growing marijuana plants were located at Dr. Boring's residence. The affidavit for the search warrant, we submit, was sufficient for the magistrate to reasonably find probable cause for the issuance of the warrant in this case. It is similar in content to the affidavit approved in Dr. Boring's previous case involving marijuana possession.

In *Boring v. State*, 253 So.2d 251, 255 (Miss. 1971), we find the following:

The affidavit in the instant case not only says that the informant had seen marijuana in the residence, or place to be searched, but that the informant had actually furnished the officer a sample of the

drugs; moreover, the officer had personally observed known users of marijuana go to and from the place sought to be searched.

The actual known facts plus the surrounding circumstances were such as to lead a reasonably prudent and cautious man to believe that the law was being violated and that contraband was being kept in the residence of the appellant at the time the search warrant was issued.

253 So.2d at p. 255. (emphasis supplied)

Additional language found in *Boring* patently applicable here is quoted as follows:

"The law does not authorize an officer to make a search on mere information of the informant, but the information must be communicated as a fact within the knowledge of the person communicating the information. In other words, a search warrant is not issued except on information amounting to probable cause, and mere rumor is not sufficient to constitute probable cause." *Elardo v. State*, 164 Miss. 628, 632-633, 145 So. 615, 616 (1933); followed in *Norman v. State*, 167 Miss. 690, 146 So. 639 (1933).

253 So.2d at p. 255. (emphasis supplied)

The information furnished by the informant in the case at bar bears little or no resemblance to idle rumor or irresponsible conjecture. This information was factual. Quite clearly, the affidavit at bar passes constitutional muster and withstands Aguilarian analysis.

Petitioner argues also that material misrepresentations abound in the affidavit, and when combined with the purportedly existing Aguilarian deficiencies, render the search warrant void under *Franks v. Delaware*, *supra*.

We responded very briefly to this contention at the close of Point A. and respectfully decline to plow that ground again.

C.

The Evidence Admitted Was Not Obtained As a Result of an Illegal and Unreasonable Search and Seizure.

Petitioner has once again fairly and accurately recited the facts applicable to the issue presented. He argues that the discovery of the marijuana plants by Deputy Fondren and Deputy Banks prior to the actual service of the search warrant by Sheriff Freeman constituted an illegal search and that this evidence should have been excluded pursuant to his Motion to Suppress. We strongly disagree.

One must not lose sight of the fact that the Fourth Amendment clearly recognizes that the individual's right of privacy must at times give way to the needs of society. That amendment prohibits only "unreasonable" searches and seizures, not all of them. Therefore, the ultimate test in all search and seizure situations is whether the governmental action is reasonable in light of all the surrounding circumstances. The question at bar involves the reasonableness of the procedures used by the officers in serving and otherwise executing the search warrant in their possession.

Deputy Fondren and Deputy Banks, contrary to appellant's assertion, were not trespassers. They were lawfully on the premises by virtue of a valid search warrant issued minutes earlier by Judge Wailes. *Dunn v. State*, 146 So. 448 (Miss. 1933). The fiat was in the possession of Sheriff Freeman. At the time Banks and Fondren approached the rear of Dr. Boring's home, the sheriff was inside his automobile approximately 100 yards from the front en-

trance of the dwelling house. The fact that a warrant existed authorizing the search of the defendant's residence negates petitioner's criticism that the officers trespassed.

When a Mississippi officer is given a search warrant he is duty bound to perform the order requiring a search of the place designated in the warrant for the thing therein described. Section 97-11-37, Mississippi Code 1972 Annotated (1973); *Salisbury v. State*, 293 So.2d 434 (Miss. 1974). There is nothing in the United States Constitution or the laws of this state that requires police officers to attach a search warrant to the distal end of a telescopic pole and attempt to serve it upon the occupant of the premises from an adjacent street while they simultaneously announce their presence over a bullhorn. If every officer approaching the building to be searched was deemed a trespasser once setting foot upon the premises, there rarely, if ever, could be a valid search conducted pursuant to a warrant.

Nor is there any constitutional or statutory authority for the proposition that police officers lawfully on the premises for the purpose of executing a search warrant must enter the place to be searched through the same door. Furthermore, it is not necessary that each officer approaching the premises have a copy of the warrant in his possession notwithstanding the advent and availability of photocopying equipment produced by Xerox and other reputable specialists.

Officers must exercise their judgment in conducting a search. We submit that they may take reasonable measures to secure the premises and insure that evidence of a highly evanescent character will not be removed from the premises or destroyed or concealed beforehand. This, respondent contends, is the first of several reasons why petitioner's argument is without merit.

It was reasonable under the circumstances existing in the case at bar for two members of the sheriff's department to approach the premises from the rear while the sheriff and a third deputy approached Dr. Boring's Virginia Street residence from the front. It is at least arguable that the occupant might decide to flee rather than submit to a search. More significantly, however, the evidence the officers sought consisted largely of contraband evanescent in character. The marijuana plants were small - only four to six inches in height - and were subject to being quickly and easily plucked from their potted posture and destroyed or concealed beforehand by the occupant of the premises.

In *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), this Court recognized, in a "search incident" context, the reasonableness of a warrantless seizure of highly destructible evidence. SEE ALSO: *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973), which involved a search incident to a detention, based upon probable cause but not amounting to arrest, for readily destructible evidence.

To conclude that police officers, acting at 3:30 a.m. under the authority of a valid search warrant, cannot constitutionally approach the residential premises of a suspect and secure (not physically seize) and preserve in a reasonable manner (close surveillance in the case at bar) evidence of an evanescent character, makes about as much sense to us as a stowaway in a kamikaze plane.

The officer's cursory search, if any, conducted here for the limited purpose of securing and protecting the evidence was not unreasonable. It did not involve a physical entry into the place to be searched but consisted only of the use of their ocular faculties from a place where they had a valid and legal right to be.

The second reason petitioner's contention is devoid of merit is that personal service of the warrant, while clearly occurring after the cursory viewing of the contraband, was made minutes thereafter and was reasonably contemporaneous with the observations made by Banks and Fondren.

The purpose of a warrant, in addition to authorizing the officer to make the search, is to inform the owner or occupant that the search is authorized so that he will not resist. *Matthews v. State*, 134 Miss. 807, 100 So. 18, 19 (1924). While the requirement of service has apparently been strictly applied by the Mississippi Supreme Court we find nothing in the Fourth Amendment that requires that service inflexibly and invariably be done before the search takes place. Not surprisingly, petitioner has cited no authority supporting this viewpoint. The fact that the warrant in the case *sub judice* was not served on the defendant until immediately after the cursory viewing of the contraband should not void an otherwise valid search. *United States v. Cooper*, 421 F. Supp. 804 (W.D. Tenn. 1976).

In the case at bar the preliminary search, if any, was *cursory*, and it occurred while the officers were present on the *outside* of the premises to be searched. They had approached the rear entrance to the building and had a valid and lawful right to do so. They neither invaded the sanctity of petitioner's interior domain by physical entry of the house to be searched nor did they attempt to enter into the screened enclosure connected with it. The officers focused the beams of their flashlights on the area of the porch where they expected the marijuana plants to be located and, *voila*, the contraband was precisely where the informant had said it would be, patently exposed to the view of anyone standing at the rear entrance to Dr. Boring's residence. The preservation of the evidence

was vital, for without it the prosecution could obviously not hang about the neck of petitioner the albatross of guilt.

Furthermore, the warrant in this case was personally served on the defendant by the sheriff almost contemporaneously with the cursory viewing of the contraband. Here the interior search was not substantially complete prior to the time petitioner became aware of the existence of a search warrant authorizing it. In this case the search and seizure were not effectively completed or consummated until after service of the warrant had been made in the defendant's bedroom.

In the alternative, we would urge that there was, in fact, no search at all, cursory or otherwise, prior to the service of the warrant. The Fourth Amendment did not require that Deputy Fondren and Deputy Banks mask their eyes at the time they approached the back of Dr. Boring's residence.

Suppose the marijuana plants had been located on a window sill, there situated as household decor. Exposed to the view of anyone lawfully on the exterior premises, the marijuana plants could not, in this posture, be the objects of a search. We apply the same logic to the facts at bar. What the officers observed exposed to the naked eye in plain view was not the product of a search, and the Fourth Amendment is not applicable.

It has been said on numerous occasions by the Supreme Court of Mississippi that the eye alone cannot be a trespasser. *Howell v. State*, 300 So.2d 774, 775 (Miss. 1974); *Campbell v. State*, 278 So.2d 420, 422 (Miss. 1973); *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So.2d 512, 515 (1963). Cf. *Ker v. California*, 374 U.S. 23, 43, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963); *Harris v. United States*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968).

Thus, it is not a "search" for a police officer to see with an intruding eye what may be observed from a place he has a legal right to be. What a person knowingly exposes to the public, even in his own home or office, is not the subject of Fourth Amendment protection. *Katz v. United States*, 389 U.S. 347, 351, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

The officers in the instant case were lawfully upon the exterior premises pursuant to a valid search warrant directed toward the dwelling house situated thereon. The initial intrusion bringing the police officers within plain view of the marijuana plants was legitimate. Deputy Banks exclaimed, "we just walked up through the yard and shined a light, and there they were." (R. 64) There was, we submit, no search. If, on the other hand, there was, it was conducted reasonably pursuant to a valid warrant describing with the particularity required the place to be searched and the thing to be seized.

Finally, a comment concerning the exclusionary rule is *apropos*. In *Davis v. Mississippi*, 394 U.S. 721, 724, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), it was said that the purpose of the exclusionary rule is to deter overreaching conduct by officers prohibited by the Fourth Amendment.

The officers in this case did what they were required to do. They procured a search warrant from the proper official. They had the fiat in their possession and served it on the defendant immediately after taking reasonable precautions to insure that the evidence would not be destroyed or concealed. This is not the type of overzealous and overreaching conduct that the Fourth Amendment proscribes. While the police do not always get their Fourth Amendment "do right" in gear, it is clear to us that in the case at bar they walked the pathway of righteousness.

D.

The Judicial Construction Given to Section 41-29-105 Suffers Not From Constitutional Infirmary.

Petitioner takes umbrage over the judicial construction given by the Mississippi Supreme Court to section 41-29-105, subsections (q) and (z) for the obvious purpose of effecting legislative intent. He elects to construe the law utilizing a hypertechnical and unrealistic approach rather than interpreting the statute in a common sense manner. Plain ole everyday "horse sense" is often a worthy substitute for judicial harangue. Still, we are compelled, nevertheless, to articulate briefly a response to the questions presented.

Petitioner claims that "... by the reading of the two subsections [(q) and (z)] together, the state would still be required to prove that manufacture was effected by extraction, by chemical synthesis or by a combination of the two methods." (Petitioner's pleading at p. 16) He has substituted nonsense for horse sense.

Petitioner claims further that he was not given fair warning of the crime proscribed prior to judicial interpretation and that the Court's construction can only have prospective operation. This latter argument is presented in an *ex post facto* context and is, likewise, unavailing. Our position is that section 41-29-105 is free from ambiguity when subsections (q) and (z) are read together, as they must be. Nonetheless, an authoritative construction by a state's highest court puts appropriate words in a statute as definitely as if it had been amended by the legislature. *Winters v. New York*, 333 U.S. 507, 514, 92 L.Ed. 840, 68 S.Ct. 665 (1948).

The Mississippi Legislature was not, as petitioner suggests, guilty of a terrible sin of omission. The statutory

definition of "manufacture" appearing in subsection (q) makes perfectly good sense when read together with subsection (z) which defines "production."

"Manufacturing" marijuana means to grow, to produce, to cultivate, to propagate or to harvest marijuana either "directly" by natural agricultural production or "indirectly" by means of extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of both. "Manufacture" means "production" [subsection (q)] and "production", as defined, embraces or includes the "manufacture, planting, cultivation, growing or harvesting of a controlled substance" [subsection (z)].

Petitioner was charged with manufacturing "directly" "... by propagating or growing 23 plants of cannabis..." and not with manufacturing "indirectly" by extraction, chemical synthesis, or a combination of both. Thus, said the Supreme Court of Mississippi, "[t]he simple growing of the [marijuana] plant is prohibited."

In our legal brief filed in the State Supreme Court, we examined in depth the legislative history of the statute in question. In a terse and telling tale captioned fittingly as *The Capricious Comma Caper*, we examined the interesting and peculiar legislative history of the comma placed by the codifier after the word "indirectly" appearing in subsection (q).

House Bill 1238 (SEE: Respondent's Section VI, *supra*), section 41-29-105's precursor, does not contain the fickle comma. The Mississippi Legislature obviously did not intend that the phrase "either directly or indirectly" be set out parenthetically and thus give the appearance, absent additional scrutiny of related statutory subsections, that he who produces, prepares, propagates, compounds,

converts, or processes a controlled substance may do so *only* by extraction, chemical synthesis, or a combination of both. We invite this Court's attention to the definition of "Narcotic drug" in subsection (s). There is neither a comma preceding the word "directly" nor following the word "indirectly."

Clearly there has been a printer's error. If petitioner was not, as he timorously and unpersuasively claims, given fair warning of the offense proscribed, it was a self-inflicted wound due in part, if not in toto, to his misplaced reliance on the codifier and not the legislature. In this state, all persons are presumed to know the law. *McNeely v. State*, 277 So.2d 435 (Miss. 1973).

If we assume that subsection (q) is not entirely free from ambiguity [respondent contends that it is when subsection (q) is read together with subsection (z)], it is constitutionally permissible for a state appellate court to search out its meaning. While not disclosing it directly in its written opinion, the Mississippi Supreme Court implicitly relied on several general rules prevailing in this jurisdiction dealing with the subject of statutory construction.

In this state the Supreme Court may resort to historical background of a penal statute to find its meaning. *Aikerson v. State*, 274 So.2d 124, 128 (Miss. 1973). Cf. *Scales v. United States*, 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469 (1961). Our Court will not impute an unjust or unwise purpose to the legislature in enacting a law when any other reasonable construction can save it from such imputation. *Aikerson*, 274 So.2d at p. 127. In determining the intent of the legislature all statutes enacted on the same subject must be construed together so as to indicate the policy of the legislature in the whole subject. *Id.*, 274 So.2d at p. 127, footnote 2. Furthermore, the punctua-

tion of a statute will not control its plain meaning; the Mississippi Supreme Court will disregard punctuation in order to give effect to plain intent of the statute. *Id.*, 274 So.2d at p. 127.

Obviously the definition of the word "production" (which includes "growing") in subsection (z) could not be reconciled with the definition of "manufacture" appearing in subsection (q) were credence given to appellant's loose interpretation of the statute. The legislature could not have intended to limit, to the exclusion of others, the manufacture of a controlled substance solely to the three methods specified by appellant when it is clear that "production" embraces "manufacture" and includes "growing".

These local rules of statutory construction are wholly consistent with the federal rules of construction adhered to by this Court. It is true that a criminal statute must be strictly construed, but the canon of strict construction of criminal statutes does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislation. *United States v. Campos-Serrano*, 404 U.S. 293, 30 L.Ed.2d 457, 92 S.Ct. 471 (1971).

While a criminal statute is to be strictly construed, it is not to be construed so strictly as to defeat the obvious intention of the legislature. *Barrett v. United States*, 423 U.S. 212, 46 L.Ed.2d 450, 96 S.Ct. 498 (1976). The doctrine of strict construction is not an inexorable command to override common sense and evident statutory purpose; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. *United States v. Moore*, 423 U.S. 122, 46 L.Ed.2d 333, 96 S.Ct. 335 (1975).

In summary on this point, we submit that there is no ambiguity when subsection (q) is read together with subsection (z). Nor is subsection (q) so totally ambiguous within itself as to provide inadequate warning of the conduct proscribed. Under Mississippi law a qualifying clause following several clauses may be applied to all of them, if applicable, or to the last one only, as best accords with the purpose and spirit of the act. *State v. Louisiana & N.R. Co.*, 97 Miss. 35, 53 So. 454 (1910). This has been called the doctrine of the "last antecedent." *Marquette Cement Mfg. Co. v. Fidelity & Deposit Co. of Maryland*, 173 Miss. 164, 158 So. 924 (1935). Relative and qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote. *Id.*, 158 So. at p. 925.

Thus, the phrase "... by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis", refers to "indirect" means of manufacture. "Growing", on the other hand, is a form of manufacture "directly", e.g., by natural agricultural production.

One who manufactures by producing or propagating a controlled substance may do so "directly" by growing naturally and agriculturally or he may do so "indirectly" by extraction, chemical synthesis, or a combination of both.

This case is not strictly analogous to *Bowie v. City of Columbia*, 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964), cited and relied upon by petitioner. Assuming the statute assailed here is, a la *Bowie*, "narrow and precise", we do not have before us an *expansive* judicial construction adopted by a state court broadening or redefining "... conduct clearly outside the scope of the statute as written ...". [emphasis supplied]

Petitioner implies that he thought he could grow marijuana with absolute impunity. Section 41-29-105(q) and (z) is not susceptible, we respectfully submit, to such an errant construction.

E.

The Denial of a Continuance by the Lower State Court Did Not Violate Petitioner's Constitutional Right to Due Process of Law.

Petitioner argues that the trial judge abused his judicial discretion in denying him a continuance filed the very day of trial for the purpose of obtaining at the proceedings the presence of an out-of-state expert witness. Petitioner claims that "... due process requires that the defendant should have a reasonable time in which to secure an expert to analyze the material and refute the techniques of the state's expert witness." (Petitioner's pleading at p. 18)

A full hearing was conducted pursuant to the filing of this motion during which testimony from two defense attorneys was taken. Scrutiny of this testimony does not disclose any pretrial intention to secure the presence of the witness for the purpose of analyzing the contraband. It does indicate that the defense sought him for the purpose of testifying that: [1] the tests used by the state's toxicologist can lead to an erroneous conclusion that THC was present in the samples taken (R. 99), and [2] that marijuana does not grow, nor is it planted, cultivated, or harvested, either directly or indirectly, by any of the three methods defined and proscribed by Mississippi law. (R. 296)

The witness sought by petitioner was Dwight S. Fullerton, Ph.D. Associate Professor of Medicinal Chemistry at the Oregon State University School of Pharmacy in Corvallis. (R. 101) The record indicates that Fullerton, charg-

ing a handsome fee, testified frequently at trials involving prosecutions for violations of various and sundry controlled substances laws. His pretrial fee was \$200.00, for which one received a bundle of literature. His trial fee was \$400.00 plus airfare and other travel expenses. Additional consultation was available at \$20.00 an hour. (R. 103) For this tidy sum one would have little difficulty in securing an expert to testify that fluoride causes dental caries or that eggs can produce cancer in the reproductive tract of a chicken.

Even so, because of prior commitments Fullerton would not have been available to testify until the third week of March, 1978. The trial, of course, was conducted on November 28-29, 1977. A continuance would have resulted in a four month delay at considerable time and expense. Subpoenas had been issued, witnesses had been summoned and were present, and the case was ready for trial. Is not the State and the local taxpayer also entitled to Due Process of Law?

The argument advanced is devoid of merit for a number of reasons. First, the record reflects that petitioner was allowed to extensively question the state's toxicologist, James M. Williams. The cross-examination of this witness consumes approximately thirty-six (36) pages of the trial record (R. 216-251), and petitioner passionately probed the expert's knowledge in detail with regard to the identity of the tests conducted and the methods and procedures utilized by him in determining the character of the contraband.

Moreover, a week prior to trial the defense had successfully obtained from the court below an order requiring James Williams to submit to an interview to be conducted by attorneys for the defendant. (R. 17) By virtue of the Mississippi Supreme Court's holding in *Scott v. State*,

359 So.2d 1355, 1360 (1978), such an order issued by the trial judge was more generous than correct.

Second, and more importantly we think, is the fact that petitioner, neither prior to trial nor prior to his motion for a new trial, nor at any other time, sought to obtain an independent chemical analysis of the marijuana seized at Dr. Boring's address. Under Mississippi law, in cases of possession or sale of a prohibited substance where the outcome of the case is dependent upon its identification as contraband, due process requires making the substance available to the defendant for inspection and analysis when the state has some of the substance. *Poole v. State*, 291 So.2d 723, 725 (Miss. 1974) citing *Jackson v. State*, 243 So.2d 396 (Miss. 1970).

There is no indication that all of the substance in this case was consumed in analysis nor does the record indicate that the Leflore County authorities, who kept, watered, nurtured and otherwise tended to four of the six-inch high plants seized (growing them to a height in excess of five [5] feet), exhausted the supply by unlawfully utilizing the alveolar sacs of their respiratory organs. It is difficult to envision why petitioner felt compelled to reach out to Corvallis when an independent analysis could have been readily obtained in a home state environment. The application of common sense to the facts at bar clearly justifies the inevitable conclusion that the analysis of the substance was not left totally within the province of the state chemist.

Procedurally speaking, petitioner did a commendable job in the drafting and filing of his application for a continuance. Yet there is a procedural deficiency under our state laws worthy of recognition here. Petitioner did not secure the *ex parte* affidavit of the expert witness and present it, on his motion for new trial or at any

other time, to the judge for his scrutiny and consideration. *King v. State*, 251 Miss. 161, 168 So.2d 637 (1964). The affidavit of record that was attached to petitioner's sworn motion for a continuance is the affidavit of the defense attorney. (R. 97-105) Thus the proffered testimony of the absent witness emanated from the lips of counsel and not from the lips of he who would have purportedly testified to the facts stated. While an issue may contain a federal question, this Court will eschew review if there is an adequate state ground that supports the decision of the state appellate tribunal. *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965).

"That the action of the [state] trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this Court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." *Hardy v. United States*, 186 U.S. 224, 46 L.Ed. 1137, 22 S.Ct. 889 (1902).

We respectfully submit that the state trial court did not abuse its judicial discretion in refusing to grant a continuance. It is clear that no injustice resulted from the denial thereof. The last sentence of section 99-15-29, Mississippi Code 1972 Annotated (1973),⁴ states: "A denial of the continuance shall not be ground for reversal unless the Supreme Court shall be satisfied that injustice resulted therefrom."

At his sentencing hearing petitioner candidly told the trial judge:

"What I did was just crazy . . . I've got more sense than to do something like that, but I did it. That makes me think that's the reason I did it." (R. 330)

4. Petitioner's pleading at p. 5.

When placed in this environment, the brouhaha created over the denial of a continuance is lacking in merit. "Manifest injustice", the denial was not.

IX. CONCLUSION

The petitioner's contentions pose no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the petition for writ of certiorari in all justice should be denied.

Respectfully submitted,

A. F. SUMMER
Attorney General

KAREN GILFOY
Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Attorneys for Respondent

Of Counsel

BILLY L. GORE
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, Billy L. Gore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, 3 copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi to W. S. Moore, Esquire, 514 Barnett Building, Jackson, Mississippi 39201.

This the 14th day of May, A.D., 1979.

BILLY L. GORE
Special Assistant Attorney General